ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CACR06-888

May 9, 2007

RANDY MILLER
APPELLANT

AN APPEAL FROM UNION COUNTY CIRCUIT COURT
[CR2005-0056-4]

V.

HON. CAROL CRAFTON ANTHONY, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

On December 7, 2005, a Union County jury found Randy Miller guilty of two counts of delivery of a controlled substance (cocaine), for which he received two consecutive forty-year terms in the Arkansas Department of Correction. He challenges the sufficiency of the evidence to support the convictions. Appellant's argument is not preserved for appellate review; therefore, we affirm.[1]

Randy Conley worked with the narcotics division of the El Dorado Police Department. He had an arrangement with Charles Robinson, a confidential informant,

[1]The judgment and commitment order was filed on December 20, 2005, but his notice of appeal was filed on January 20, 2006. On first glance, this appears to be one day late. *See* Ark. R. App. P.–Crim. 2(a)(1). However, appellant filed a motion to reduce his sentence on December 8, 2005. The trial court did not rule on the motion; therefore, the motion was deemed denied on January 7, 2006. *See* Ark. R. App. P.–Crim. 2(b)(1). Appellant's notice of appeal was due thirty days from January 7, 2006, and he filed his notice of appeal within that time period. Therefore, appellant filed a timely notice of appeal.

whereby Robinson would execute controlled buys in exchange for cash. On November 10, 2004, Robinson called appellant and asked appellant if he could buy some crack cocaine. Appellant agreed. Officer Conley searched Robinson's person and vehicle to ensure that Robinson had no contraband on him. Robinson was then wired with an audio-video recorder at the police department and returned to a prearranged location. After returning to the meeting point, Robinson went to 1205 East Barnes and purchased what was later determined to be 4.8 grams of cocaine base from appellant. Robinson returned to Officer Conley and gave him the drugs. A second controlled buy was performed on November 19, 2004, where Officer Conley and Robinson used the same process as before. Robinson returned the second time with 5.0801 grams of cocaine base.

The jury viewed a video of the controlled buys. One video shows Robinson asking another person on the street if he or she had any "hard white," referring to crack cocaine. No one came into view. On cross-examination, Officer Conley noted that on November 10, Robinson was supposed to return with three grams of crack cocaine; he returned with 4.8 grams. On November 19, Robinson was supposed to return with a quarter of an ounce (approximately seven grams); he returned with five grams. After hearing the evidence, the jury found appellant guilty of two counts of delivery of a controlled substance and sentenced him to two consecutive forty-year terms in the Arkansas Department of Correction.

For his sole point on appeal, appellant challenges the sufficiency of the evidence to support the convictions. Specifically, he argues that the evidence does not eliminate the possibility that the drugs delivered to Officer Conley from Robinson could have come from a source other than appellant and that the video admitted into evidence does not show money or drugs changing hands. However, we do not reach the merits of appellant's sufficiency challenge because he failed to preserve his argument for appellate review.

A directed-verdict motion must be made at the close of the prosecution's case and

renewed at the close of all of the evidence. Ark. R. Crim. P. 33.1(a). The failure to make and renew a motion at these times constitutes a waiver of any question pertaining to the sufficiency of the evidence to support the conviction. Ark. R. Crim. P. 33.1(c).

At trial, appellant moved for directed verdict at the close of the State's case; however, he failed to renew that motion until after the jury had been instructed. An attempt to renew a motion for directed verdict after the jury has been instructed is not timely under the rules of criminal procedure. *Webb v. State*, 326 Ark. 878, 935 S.W.2d 250 (1996). Because appellant failed to preserve his challenge to the sufficiency of the evidence, we affirm without reaching the merits. *See Nelson v. State*, 365 Ark. 314, — S.W.3d — (2006) (noting that an appellate court will not reach the merits of an unpreserved challenge to the sufficiency of the evidence).

Affirmed.

PITTMAN, C.J., and BIRD, J., agree.